HIPAA Privacy Rule
Frequently Asked Questions

The following is a series of frequently asked questions that have been raised by DMH facility privacy officers regarding the implementation of certain components of the HIPAA privacy rule. Each question will be in bold and then the answer will follow that question not in bold. We have also attempted to provide the questions and answers in an organized format by the DOR (policy) number, and then general topics are at the end of the document. Questions and answers in two different sections if they pertain to more than one topic..

I. NOTICE OF PRIVACY PRACTICES (DOR 8.005)

(1) THE NOTICE OF PRIVACY PRACTICES TALKS ABOUT A RIGHT TO REQUEST CONFIDENTIAL COMMUNICATION. IS THIS SECTION STRICTLY FOR OUTPATIENT CONSUMERS, OR IS IT REFERRING TO GUARDIANS? CAN THIS SECTION BE DELETED WHEN IT TALKS ABOUT NOTICE OF PRIVACY PRACTICES?

The right to request confidential communication is not strictly for outpatient consumers. It is referring to all consumers and/or their guardian if they have one appointed. It cannot be deleted as it is required by the federal HIPAA privacy rule. Consumers may also request an alternative means of communications as well, such as by mail to a work address rather than home. Typically that would be acceptable as well.

(2) THE NOTICE OF PRIVACY PRACTICES TALKS ABOUT A RIGHT TO RECEIVE A PAPER COPY OF THE NOTICE. THIS APPEARS TO IMPLY THAT RESIDENTS MAY HAVE ACCESS TO THE INTERNET. CAN WE DELETE SENTENCES DEALING WITH WEB SITES OR ELECTRONIC MEANS?

No. The HIPAA privacy rule requires that if DMH and/or one of the facilities maintains a web site, the Notice of Privacy Practices must be posted on that web site. However, there is no implied right for any of our consumers to have access to the internet if it is not appropriate for them to have access to the internet because of treatment considerations. Please remember that treatment is still our primary goal. The Notice of Privacy Practices does not imply that each consumer has an absolute right to access the internet. It simply says <u>if</u> access to the internet is available to a consumer, they may be able to see a copy of the notice of privacy practices in that manner.

(3) IN THE NOTICE OF PRIVACY PRACTICES UNDER THE LAW ENFORCEMENT SECTION, IT STATES THAT WHEN THE CONSUMER IS A FORENSIC CLIENT WE

SHALL SHARE INFORMATION WITH LOCAL LAW ENFORCEMENT. CAN WE ADD SEXUALLY VIOLENT PREDATOR CLIENTS TO THAT REQUIREMENT?

Yes, we can, but only for the purposes of sharing information with law enforcement to register them as sex offenders when the statute requires us to do so. The reference to forensic clients in that particular section of the Notice of Privacy Practices is because Missouri statute requires or mandates that we share information with law enforcement regarding forensic clients in Chapter Section 630.140. Likewise, even though not detailed in the Notice of Privacy Practices, we are required by law to share information with law enforcement for the sex offender registration. (Sex Offender registration requirements can be found in Section 589.400, RSMo).

(4) WHAT DO WE DO IF WE HAVE A BLIND CONSUMER WHO NEEDS TO RECEIVE THE NOTICE OF PRIVACY PRACTICES? WHAT ABOUT IF WE HAVE A CONSUMER WHO NEEDS A SPANISH VERSION OF THE NOTICE OF PRIVACY PRACTICES?

The Department of Mental Health has translated the notice of privacy practices into Braille and into Spanish. One copy of the Braille translation for each facility will be forthcoming. As soon as the Spanish version is finished, that will be distributed to the facilities as well. If you need more than one copy of the Braille version, you need to let either Ann Dirks-Linhorst or Janet Conboy know so that additional copies can be ordered. However, the copies are fairly expensive, and we were unable to pull from CTRAC an accurate count of how many may need to be purchased. Therefore we have initially started with an order of one Braille copy per facility.

(5) WHERE SHOULD THE NOTICE OF PRIVACY PRACTICES BE POSTED AT ATHE FACILITY?

HIPAA is silent as to the actual location for posting. The following is considered by DMH to be a reasonable approach. If it is a facility that does admitting or assessments, the Notice of Privacy Practices should be prominently displayed in one of those areas. If the facility does not do either of those functions, instead the Notice of Privacy Practices would be posted in the same place as all other client rights postings.

(6) SHOULD THE MINOR CONSUMER SIGN THE ACKNOWLEDGEMENT AS WELL AS THEIR PARENT FOR THE NOTICE OF PRIVACY PRACTICES?

HIPAA does not require the signature of the minor if they are not emancipated or are not signing for substance abuse treatment services. If the minor consumer is first admitted involuntarily and the parent/guardian is not

available, certainly present the Notice of Privacy Practices, but then a signature should obtained from the parent.

(7) WHO SHOULD SIGN THE NOTICE OF PRIVACY PRACTICES IF THE MINOR CONSUMER IS IN THE LEGAL CUSTODY OF THE DIVISION OF FAMILY SERVICES, OR THE DIVISION OF YOUTH SERVICES YET REMAINS IN THE PHYSICAL CUSTODY OF THE PARENTS?

The first choice for signature would be from the legal custodian, although an effort should also be made to share the information with the parents if parental rights have not otherwise been terminated.

(8) WHAT ABOUT DEAF OR HEARING IMPAIRED CONSUMERS AND THE RIGHT TO REQUEST ALTERNATIVE MEANS OF COMMUNICATION AS REFERENCED IN THE NOTICE OF PRIVACY PRACTICES?

Sometimes deaf or hearing impaired clients may request to receive information via e-mail as an alternative means of communication. This is allowable under HIPAA, but the issue becomes one of alerting the consumer that once his or her PHI is outside of the DMH firewall or VPN, that it would not be considered secure. DMH would need the consumer to request that e-mail communication in writing, and then in that same document agree or acknowledge that they understand that e-mail may not be a secure means of transmission outside of the DMH system. I will draft a new form which I will electronically distribute for this purpose.

(9) WHERE SHOULD THE NOTICE OF PRIVACY PRACTICES BE ELECTRONICALLY POSTED?

DMH must post the Notice of Privacy Practices on the www.modmh web page. In addition, each facility that maintains a web page must post the entire notice on that web site. Posting only the condensed or tri-fold version is not acceptable and does not meet the requirements of the Privacy Rule.

II. CONFIDENTIALITY AGREEMENT AND STAFF ACCESS (DOR 8.040)

(1) Who signs the confidentiality agreement for consumers who are either volunteers or workers and have been appointed a guardian?

Both the individual consumer and the guardian should sign the confidentiality agreement that is referenced in DOR 8.040. This will allow the consumer to know what is expected of him or her, and at the same time allow the guardian to indicate that he or she believes that the client understands what is

expected. The privacy rule does not specifically speak to this situation, but this response reflects a reasonable approach to dealing with this issue.

III. AUTHORIZATION (DOR 8.050)

(1) THE FEDERAL BLOCK GRANT IS REQUIRED TO LIST PRIMARY CONSUMERS AND FAMILY MEMBERS BY NAME. DO WE NEED TO GET AN AUTHORIZATION FROM THOSE PERSONS THAT WILL ALLOW US TO CONTINUE THAT PRACTICE?

The federal block grant relates to CPS and potentially ADA clients. Since it is a federal law that requires us to list primary consumers and family members by name, DMH is required to do so by law. HIPAA allows an exception for us to share information without authorization when required to do so by law. In addition, DMH's Notice of Privacy Practices alerts the consumer that there could be federal programs that we have to share or use or disclose their protected health information with in order to comply with HIPAA.

(2) STATE ADVISORY COUNCILS LIST THE NAMES OF PRIMARY CONSUMERS, PARENTS OF CHILDREN RECEIVING SERVICES IN ORGANIZATIONAL INFORMATION, INCLUDING ADDRESSES. DO WE NEED AN AUTHORIZATION TO CONTINUE THAT PRACTICE?

Yes. I can find no state law that would require and/or allow state advisory councils to list the names of primary consumers or parents of children receiving services without obtaining a HIPAA compliant authorization.

(3) STATE ADVISORY COUNCIL MEETING MINUTES ARE PUBLIC RECORD AND INCLUDE NOT ONLY NAMES OF ATTENDEES BUT OFTEN INCLUDE SPECIFIC COMMENTS MADE BY INDIVIDUALS DURING THE MEETING. THOSE MINUTES ARE OFTEN SHARED WITH OUTSIDE ORGANIZATIONS THAT REQUEST A COPY. CAN WE CONTINUE THAT PRACTICE?

HIPAA is not intended to curb consumers participation in state advisory council meetings. Therefore, we just need to advise them that what they say may be reported in the minutes, and those minutes shared outside the Department of Mental Health. If they choose to not have their comments recorded, they need to make that known to the secretary or whomever is taking minutes of the meeting. I believe that the best way to demonstrate that they have been educated regarding this, and they continue to choose to participate is to have each advisory council that is a consumer or parent of a child receiving services sign an statement at the time that they join the state advisory council which clearly states that disclosure of the information they share as part of the open meeting process may be to outside organizations as

part of that meeting process. Another argument to remember for this question, is that by agreeing to participate in an open or public meeting, it can be inferred that the consumer is giving authorization to share their information as part of the process. We simply need to educate the consumer on how far that information can be shared.

(4) HOW ABOUT WEB SITES THAT ARE DMH SANCTIONED WHICH LIST NAMES, ADDRESSES, AND OTHER INFORMATION OF CONSUMERS? DO WE NEED TO DO ANYTHING TO ADDRESS THIS PRACTICE?

No DMH client or consumer name or address should appear on our web site without that consumer's authorization to do so.

(5) CENTRAL OFFICE PERIODICALLY DIRECTS THE CONSUMER CALL TO THE REGIONAL OFFICE. IF THE REGIONAL OFFICE THEN CALLS THE CONSUMER, HOW DO THEY ESCAPE THE FACT THAT THE CONFIDENTIALITY OF THE CONSUMER HAS BEEN VIOLATED?

The consumer's confidentiality has not been violated by Central Office directing a consumer call to the regional office. We are allowed to direct such a call because both entities are part of the Department of Mental Health. In addition, responding to consumer calls is part of the Department of Mental Health and each facility's health care operations. Therefore, there is no problem with the regional office returning a call to a consumer when that consumer call has been directed to them by Central Office.

(6) WHAT SHOULD DMH DO ABOUT OBTAINING A CONSUMER'S SIGNATURE OR MARK ON THE AUTHORIZATION TO DISCLOSE CONSUMER MEDICAL/HEALTH INFORMATION FORM WHEN IT IS APPARENT THAT THE CONSUMER DOES NOT HAVE AN UNDERSTANDING OF WHAT THEY ARE SIGNING OR MARKING? HOWEVER, THE CONSUMER IS THEIR OWN GUARDIAN, AND HAS NOT BEEN APPOINTED ANOTHER GUARDIAN. IN ADDITION, THE CONSUMER IS OF LEGAL AGE OR CONSIDERED AN ADULT. IS IT ETHICAL TO HAVE CONSUMERS MAKE THE MARK WHEN THEY MAY NOT UNDERSTAND WHAT THEY ARE DOING?

In Missouri, until an individual has been adjudicated as incapacitated and therefore appointed a guardian, they are deemed to be competent. That is the letter of the law, and for purposes of HIPAA, it appears that that is the law we need to follow. If a parent has not been appointed as a guardian for an adult consumer, the parent cannot sign the authorization on behalf of the adult consumer. We can have a DMH witness that consumer making a mark on the disclosure portion of the authorization form. The parent can also sign as a witness to the consumer making their mark on the authorization form. The

same answer is true for acknowledging the Notice of Privacy Practices. If the consumer is so incapacitated that they are unable to understand these types of proceedings, it may be that the case manager or social worker may want to discuss whether or not a guardian or limited guardian is appropriate. I see no legal issue arising from having DMH staff witness the mark on the authorization form.

(7) IN THE PAST DMH HAS BEEN INSTRUCTED NEVER TO DISCLOSE OR RELEASE THIRD PARTY INFORMATION ABOUT THE CONSUMER. DMH WAS ALLOWED TO DISCLOSE OR RELEASE ONLY INFORMATION THAT DMH CREATED OR PAID FOR. IS DMH NOW ALLOWED TO DISCLOSE THIRD PARTY INFORMATION?

This is one area in which HIPAA will alter our current practice. HIPAA states that the definition of individually identifiable health information is any information that relates to the health or condition of the individual, the provision of healthcare services to the individual, or the payment for such services. It also pertains to any information that was created by or received by the covered entity. In addition, Missouri state statues in section 630.140, also uses the phrase "information that is obtained, maintained, or compiled by the Department of Mental Health". Therefore, if a record that you received from an outside source, for example a private hospital, has been used by your facility to make treatment decisions regarding the client, and is part of the designated record set as defined in our DOR, then it could be disclosed either with an authorization that is HIPAA compliant, or if disclosure falls into one of the HIPAA exceptions for which an authorization is not indicated.

(8) DO WE HAVE TO OBTAIN AN AUTHORIZATION TO INITIALLY DISCLOSE PROTECTED HEALTH INFORMATION TO BE ABLE TO MAKE A REFERRAL TO AN AGENCY THAT IS UNDER THE ORGANIZED HEALTHCARE ARRANGEMENT? SHOULD WE GET THE INITIAL AUTHORIZATION TO MAKE THE REFERRAL, AND THEN ONCE THE REFERRAL HAS BEEN ACCEPTED AND A CONTRACT IS APPROVED DO WE NOT NEED AN AUTHORIZATION FROM THAT POINT ON TO DISCLOSE PROTECTED HEALTH INFORMATION?

DMH is allowed to use or share information with a contract provider who is a member of the Department identified organized health care arrangement. In addition, HIPAA allows one covered entity to share protected health information with another health care provider for the purpose of obtaining treatment. Therefore, there are two ways that support the Department's sharing protected health information between a state operated facility and a community contract provider without obtaining an initial authorization. Thus that information can be shared to be able to make a referral to an agency for services.

(9) SOMETIMES THE DEPARTMENT OF MENTAL HEALTH HAS AUNTS OR GRANDMOTHERS WHO ARE RAISING GRANDCHILDREN OR NIECES OR NEPHEWS OUT OF NECESSITY AND WITHOUT ANY FORMAL GRANTING OF PARENTAL RIGHTS TO THEM BY ANY COURT. IF THAT GRANDMOTHER OR AUNT IS ACTING AS A PERSON'S PROTECTOR IN ORDER TO APPLY FOR SERVICES FOR THEM, CAN DMH ACCEPTED THEIR SIGNATURE?

This is a difficult situation. Whether it's HIPAA or current Missouri law, the best solution is to have the grandmother or aunt formally recognized as either a guardian ad litem that's acting on behalf of that minor child, or by having the parent sign either a durable power of attorney to the grandmother or aunt or at least designating them as a personal representative. Personal representative is a term recognized under HIPAA that allows covered entities to share information with the personal representative about the consumer. A minor child, unless emancipated, cannot provide a valid consent to be able to have DMH provide their protectors with any client information. The Attorney General's Office should be used to see if the local juvenile court is willing to designate that grandmother or aunt. This process can take a while, and the responsiveness of the AG's Office varies depending on the area of the state due to staffing issues. If it is a Department of Mental Health client, we may be able to also access the Attorney General's office for assistance in obtaining a guardianship. However, I must point out that this is a lengthy process, and typically cannot result in a quick fix. However, the case manager or service coordinator can make every effort to talk with the grandmother or aunt to see if the child's biological and legal mother or father can be found and at least execute one of the documents as referenced above. DMH <u>can</u> accept or take information from someone who is not a guardian. I would advise that we could take the grandmother or aunt's signature on the application for services. The catch-22 comes in when we, absent some formal judicial process in which the grandmother or the aunt has been recognized as the personal representative or guardian ad litem, DMH cannot share information back with them.

(10) IN ORDER TO SAVE US FROM REVIEWING THE VARIOUS AUTHORIZATION FORMS THAT WE RECEIVE FROM OTHER ENTITIES FOR HIPAA COMPLIANCE, WILL WE ONLY ACCEPT OUR DMH AUTHORIZATION FORM? IN ADDITION, WILL WE ONLY ACCEPT OUR AUTHORIZATION FORM IF IT IS COMPLETELY FILLED OUT.

Every effort should be made to use one consistent authorization form. Several other state agencies will also be using the same form. For example, Department of Health and Senior Services, Department of Elementary and Secondary Education, and Vocational Rehabilitation, have stated their intent to use the statewide form, #650-2616. As those agencies download the form

from the Office of Administration and enter the form into their own computer systems, the format may change. It is the responsibility of the privacy officer to simply match up the content from those forms with the content of the DMH authorization form. Typically, it would be easier for Department of Mental Health facilities to only use the DMH authorization form. However, if you receive an authorization form from one of these other state agencies, I am asking that the privacy officer look at the content, determine if the content is the same as ours (meaning simply that the formatting of the form is off but that the content is not affected), and then it would be appropriate to accept the authorization form.

No matter what authorization form is accepted, for it to be HIPAA compliant it must be fully filled out. One example that was given was when an effective date was not filled in but where a date was filled in for or by the client's signature. I would accept that form as long as there was a date by the consumer's signature. All other sections of the form, including the purpose, what information is to be released, to whom it is to be released, etc., must be completed by the consumer or their legal guardian in order for even the DMH form to be considered complete. In addition, there may be federal agencies from whom we will receive authorizations to disclose protected health information. For example, Social Security Disability determination may provide us authorization for releasing information. Those authorizations received from SSD should be assessed by the privacy officer, again to make sure that the content matches up.

To review the content matching up, the important points to look at on any authorization received is the consumer's name appearing, the purpose for the disclosure, the information that is to be disclosed, to whom it is to be disclosed, and whether or not the revocation portion of the form is completed. In addition, special attention should be paid to the alcohol and drug abuse section of the form. If it is an authorization form from another facility or agency not using the statewide form, the privacy officer or designee should determine whether or not the record falls under alcohol and drug abuse protections, and if it does, the DMH authorization form must be completed with that ADA provision included.

It is <u>not</u> feasible to send back all disability determination forms and have them execute new ones using the DMH authorization form. Therefore, the privacy officer is to assure that those components of the form are in place. Privacy Officers are also encouraged to work with the local Social Security offices to determine if an agreement can be reached on the authorization form.

(11) SHOULD SUPPORTED COMMUNITY LIVING PROGRAMS REQUIRE THAT CURRENT CLIENTS SIGN NEW AUTHORIZATION FORMS PRIOR TO THE HIPAA EFFECTIVE DATE OF APRIL 14, 2003.

Any time an authorization is signed beginning from the time that you received this memorandum, the new statewide authorization form, #650-2616 should be used. That form has been approved by the Office of Administration, and should be forthcoming on the electronic forms available site on the Office of Administration web page. You can access that web page at www.oa.state.mo.us, them click on "General Services," then click on "Forms Management" and under "Department of Mental Health" it should be the Authorization for Disclosure of Consumer Medical/Health Information (1/03). That form will have our content, Department of Mental Health content, and the appropriate form number. We have encountered problems downloading that form. OIS Customer Support has determined that you must request that the IT person at each site install the form for each PC that will use it. They have to go into "My Computer, then C drive, the Eforms folder, then get the actual number 6502616, and then click on it to begin the executable file. I know this is not convenient, but for whatever reason that seems to the route to go. You can use the reformatted version of that form in the interim until it is available on OA but you should include the form number at the bottom of that form, 650-2616. I sent out that formatted form on March 5th to all privacy officers. Do not use any form that you received prior to March 5, 2003. This will help to assure consistency in how we use the authorization form.

(12) IF A DMH FACILITY HAS AN EMPLOYEE THAT RECEIVED AN INJURY (NEEDLE STICK, BITE, ETC.) FROM A CLIENT OR A PATIENT THAT PUTS THE EMPLOYEE AT RISK FOR A BLOOD BORN DISEASE, CAN THE EMPLOYEE HAVE ACCESS TO THE MEDICAL RECORD AND WHAT DISEASE PROCESS THE PATIENT IS POSITIVE FOR WITHOUT IT BEING A HIPAA VIOLATION?

There is a Missouri statute which helps to guide us on this question. Section 191.656, RSMo 2000, sets out, for example, when HIV reports are to be considered confidential, and likewise when disclosure is allowed. Subsection (1)(a) says "public employees within the agency, department, or political subdivision who need to know to perform their public duties" may be given that information. Likewise, that statute in subsection (d) also allows disclosure to persons other than public employees who are entrusted with the regular care of those under the care and custody of a state agency, including but not limited to operators of day care, group homes, residential care facilities, etc. In subsection (2) of this statute, no liability attaches to the person who discloses the results, unless they acted in bad faith or conscious disregard to healthcare personnel working directly with the infected individual who have a reasonable need to know the results for the purposes of providing direct patient health care. I state all that to further the analysis that, even after HIPAA, there is a limited group of individuals who can know the patient's healthcare status, again always thinking back to the purpose of "who needs to perform their public duties" under HIPAA. I see nothing which would prohibit

the team member from seeing all five axes diagnoses of care. If there are staff members who do not provide direct patient health care, then under this rationale we cannot provide with access to charts at least under this rationale. There may be something different under CDC guidelines, for example for infection control purposes, the infection control nurse could be contacted.

(13) WHAT IF OUR FACILITY OBTAINS A COPY OF A PHYSICAL EXAM FROM ANOTHER FACILITY? DO WE NEED AN AUTHORIZATION BEFORE WE ARE ALLOWED TO DISCLOSE THAT PHYSICAL TO SOMEONE ELSE WHO ASKS FOR IT?

If your facility accepts that physical exam, bases treatment decisions upon it, your doctor signs off on it as having been reviewed and accepted, and it becomes a part of your designated record sets as part of your medical record, you should not need a separate authorization. It then becomes part of the designated record set, and meets the HIPAA definition of information that is created by or received by a covered entity used to make treatment decisions about an individually identifiable person.

(14) THE CURRENT STATEWIDE AUTHORIZATION FORM, #650-2616, REQUIRES THAT EITHER AN EVENT BE SPECIFIED FOR THE AUTHORIZATION TO END UPON, OR IN THE ALTERNATIVE, THAT IT EXPIRE IN ONE YEAR. CPS FACILITIES DISPUTE THIS REQUIREMENT AND REQUEST THAT A CHANGE BE MADE AS TO HOW TO COMPLETE THE FORM.

HIPAA requires either an event upon which an authorization will end or in the alternative a timeframe. Although I cannot assure that the Office for Civil Rights will consider this option as a reasonable compliance effort with HIPAA, if the facility, for long term inpatient clients, an event such as discharge or transfer or release from that facility as the event which would suspend or stop the authorization, the facility can try that. That is the only alternative that I see. According to my read of HIPAA, we cannot leave the authorization open-ended as has been suggested by the CPS superintendents. Instead, there needs to be an event entered upon which the authorization would conclude or in the alternative that it would expire in one year. DMH's current approach is consistent with how other states and private agencies are handling the authorization question. Therefore, this response is attempting to be a compromise position between leaving it open-ended, which cannot occur, and suggesting alternative language for an event that may be distant in the future, but at least a specified event. Again, my legal advice is that I cannot assure that this would meet the OCR test for HIPAA compliance.

(15) DMH FACILITY BILLING DEPARTMENTS HAVE BEEN INSTRUCTED IN THE PAST TO NOT BILL EITHER MEDICARE OR COMMERCIAL INSURANCE UNLESS

THEY HAVE THE CLIENT'S SIGNED CONSENT ON FILE. IN FACT THERE IS A MEDICARE REQUIREMENT THAT THE CLIENT SIGNATURE APPEAR ON THE CLAIM FORM PRIOR TO PAYMENT ACTIVITIES. THUS, SHOULD DMH FACILITIES USE THE DMH AUTHORIZATION FORM FOR PAYMENT OR DO THEY NEED ANY FORM COMPLETED IN ORDER TO INITIATE MEDICARE PAYMENTS?

PHI can be used for payment purposes without obtaining an authorization. Beyond the use of protected health information for payment activities, there clearly are specific Medicare signature requirements. Typically, any general requirements are overruled by any specific requirements. In addition, I can argue that specific signature requirements provide more protection for the consumer, or more control over the use of their PHI, so I would not advise going beyond that. Therefore, the DMH facility should obtain the client or parent or guardian signature when billing medicare in order to use protected health information. That interpretation will require that we continue to use the standard consent and authorization form now in use by reimbursement officers, which is form DMH 8630, which specifically authorizes determining eligibility for benefits, billing insurance, assigning insurance benefits, and billing to Medicare. Therefore, that form should still be considered and used for Medicare billings.

(16) DO WE HAVE TO FILL OUT A SEPARATE AUTHORIZATION FORM FOR EACH PERSON TO WHOM PHI IS TO BE SENT OR IF THE SAME PHI WHICH WAS AUTHORIZED TO BE RELEASED IS GOING TO FOUR DIFFERENT PEOPLE, CAN ONE AUTHORIZATION WORK?

It is possible to use one authorization form <u>if</u> the purpose for the disclosure and the PHI to be disclosed <u>is exactly the same</u> for all. Where it will get tricky is if the consumer wishes to revoke the authorization for one but not for all. In that case, I believe you would have to re-execute a new authorization for the remaining three individuals. If the purpose for the PHI to be disclosed is not the same for all, then I would say you need a separate authorization for each.

(17) IF AN INDIVIDUAL PLAN CONTAINS THE STATEMENT REFERENCING THAT A PERSON IS RECEIVING ALCOHOL AND DRUG ABUSE TREATMENT, DOES THAT MAKE THE INDIVIDUAL PLAN AN ALCOHOL AND DRUG INFORMATION RECORD? IF SO THEN DOES #2 ON THE AUTHORIZATION FOR DISCLOSURE OF CONSUMER MEDICAL/HEALTH INFORMATION NEED TO BE SIGNED BEFORE RELEASING THE PLAN TO ANYONE?

A diagnosis of alcohol or substance abuse puts that patient's entire record under the protections offered by 42 CFR Part 2. Once the records have been

identified as having 42 CFR Part 2 protection, then the authorization form needs to be signed including the provision for the release of ADA records.

(18) DOES SIGNING THE AUTHORIZATION FORM FOR THE ALCOHOL AND DRUG ABUSE INFORMATION MEAN THAT YOU ARE ALSO SIGNING FOR THE INFORMATION TO BE DISCLOSED IN THE INITIAL PORTION OF THE FORM?

No. The ADA signature relates only to the release of ADA information. The signature for the disclosure of any other information comes at the end of the authorization, and both signatures must appear.

(19) DOES AN AUTHORIZATION WITH SCHOOLS NAME ON IT ALLOW YOU TO SPEAK TO ANYONE AFFILAITED WITH THE SCHOOL DISTRICT WHO IS PARTICIPATING IN THE CONSUMER'S TREATMENT OR MUST ONE BE SIGNED FOR EACH INDIVIDUAL TEACHER?

If the consumer fills out that you can speak with personnel of a particular school or school district, then that authorization would cover anyone affiliated with that particular school or school district. Obtaining the authorization with language such as that would be acceptable.

(20) AT AN IEP MEETING THERE ARE MANY PEOPLE FROM OTHER AGENCIES AND THE PARENTS. DOES AN AUTHORIZATION NEED TO BE SIGNED IN ORDER TO SPEAK IN FRONT OF THESE PEOPLE, OR IS IT IMPLIED SINCE THE PARENTS ARE THERE THAT IT IS APPROPRIATE TO SPEAK IN FRONT OF THESE PEOPLE?

When preparing for an IEP, my advice is to have the parents execute an authorization which allows us to disclose information with all parties connected to the IEP as identified on the planning process itself. That can be done at the time of the IEP if you are unable to connect with the parents before then. Certainly it would be implied that you have the authority to speak in front of the group since the parents have requested your presence, but for documentation purposes it would be best to simply have them execute that form at or near the time of the IEP.

(21) SHOULD A JUVENILE FACILITY IMMEDIATELY OBTAIN AN AUTHORIZATION IN ORDER TO UPDATE THE RESPONSIBLE SCHOOL DISTRICT ON THE CONSUMER'S PROGRESS? WHAT ABOUT IF THERE IS A RESIDENTIAL PLACEMENT AGENCY INVOLVED?

Yes. HIPAA does not appear to allow any "honeymoon" period in which we could share information. Clearly most school districts have determined that they are not covered entities or services providers, so there does not appear to be any exception under HIPAA to disclose PHI absent an authorization. As

to the residential placement agency, if they are a health care provider (and they will be the one making that determination), and if you are sharing the PHI for the purposes of obtaining health care services, then you can share without an authorization. However, if they determined that they are not a health care provider, then you cannot share the PHI absent an authorization. You would need the authorization to share PHI. The sending facility must have an authorization to share with you under HIPAA if they are a covered entity.

(22) DOES DMH HAVE TO OBTAIN AN AUTHORIZATION TO SHARE WITH MEMBERS OF DMH'S ORGANIZED HEALTH CARE ARRANGEMENT?

HIPAA allows the sharing of PHI with members of the organized health care arrangement without an authorization if the sharing is for treatment, payment or health care operations. In addition, one covered entity (meaning one of DMH's facilities) can share PHI with another health care provider for the purpose of obtaining treatment without an authorization. (See 45 CFR Section 164.506 (a)). Treatment includes coordination or management of health care and related services by one or more health care providers. (See 45 CFR Section 164.501). Therefore, we can share PHI with our contract providers without an authorization. They too are able under HIPAA to share information with DMH without an authorization. This is a culture change and I anticipate that it will take quite some time to acquaint everyone with the new process.

(23) IS SPECIAL OLYMPICS CONSIDERED A MEMBER OF THE DEPARTMENT OF MENTAL HEALTH'S ORGANIZED HEALTH CARE ARRANGEMENT, OR IS AN AUTHORIZATION REQUIRED TO RELEASE PHI TO THEM?

Special Olympics is <u>not</u> considered part of DMH's Organized Health Care Arrangement. In addition, I do not believe it is classified as a covered entity or a health care provider. Assuming that that is true, then DMH would have to have an authorization from the consumer or parent (if a minor) or the legal guardian in order to release PHI to Special Olympics. The facility may consider obtaining this authorization during the annual Person Centered Planning process or other regular review or habilitation planning meeting.

(24) WHAT IF LAW ENFORCEMENT SHOWS UP AT THE FACILITY AND WANTS TO INTERVIEW A CLIENT AS A RESULT OF EITHER ANOTHER CLIENT OR AN EMPLOYEE PRESSING ASSAULT CHARGES? IF THE CLIENT HAS A LEGAL GUARDIAN, SHOULD THEIR AUTHORIZATION BE OBTAINED?

You should always notify the legal guardian if law enforcement wishes to speak to their ward. In these situations you could take a verbal authorization, witnessed over the telephone, but I would advise mailing out an authorization for written signature. Under HIPAA law enforcement may interview clients

who are a suspect in a crime. For verification purposes, the law enforcement officer should show a badge or other form of official identification. It would also be acceptable for them to show you a copy of the complaint or other documentation forming the basis for their interview. Each facility is encouraged to work with your local law enforcement to advise them that we can cooperate but will need certain information. That may assist when there is an incident that they must investigate.

(25) WHAT IF A CONSUMER HAS BEEN DISCHARGED BUT THE AUTHORIZATION THAT HE/SHE EXECUTED WHILE AT THE FACILITY TO DISCLOSE RECORDS TO A SPECIFIC PERSON OR ENTITY IS STILL ACTIVE, I.E. HAS NOT EXPIRED. CAN DMH DISCLOSE THE RECORDS?

Yes. As long as either the one year, or a certain event, or that the consumer has provided a written revocation of that authorization (although we should take oral revocations if the records come under 42 CFR Part 2 Alcohol and Drug Abuse records release protection), then it appears that the authorization remains in full force and effect.

(26) OUR STAFF DO NOT ACCEPT THAT A SUBPOENA ALONE IS NOT CONSIDERED ENOUGH TO DISCLOSE PHI. HOW SHOULD WE CONVINCE THEM THAT IT IS?

Even before HIPAA, Missouri case law determined that releasing confidential patient information (specifically a woman's mental health record to her ex-husband during a custody battle) without her consent and only with a subpoena was not acceptable. The Court imposed monetary fines on the private hospital which released those records. The Court opinion stated that in addition to the subpoena one of two things was necessary: either a Court Order, or the consumer's consent (what HIPAA would now refer to as the authorization) in addition to the subpoena. (See Fierstein v. DePaul). Therefore, this is not a new requirement due to HIPAA. Perhaps posting this summary of the court case in an employee newsletter, or as an educational e-mail to all staff would help.

IV. ACCOUNTING OF DISCLOSURES (DOR 8.060)

(1) WILL WE HAVE A SCREEN TO BE ABLE TO ENTER INFORMATION ON ACCOUNTING OF DISCLOSURES?

Yes. Although we had anticipated setting up a screen in CIMOR, its delayed start date has prompted us to request a screen be developed through DMH On-Line. OIS is currently working on that screen, which will be accessible through the intranet. We will be able to make a copy of that screen and have

individuals who do not have computer access fill-in the informational information manually, and then the computer or other designated component of each facility will have to make sure that that information is entered into the system. OIS has promised that the accounting of disclosure screen will be available for us to begin using in March, 2003. Therefore, do not start any local Excel sheet databases to track disclosures. We will all use the same accounting of disclosures screen through DMH On-Line, or use the paper screen to manually complete the information collection.

(2) HOW DO WE RETRIEVE DISCLOSURES MADE FROM BUSINESS ASSOCIATES THAT NEED TO BE ACCOUNTED FOR?

The answer to this question is found in DOR 8.060, subparagraph 7. That paragraph says that DMH has up to sixty (60) days after the receipt of the request for an accounting of disclosures to act on that request. If the facility has disclosed information to a business associate regarding the consumer then the facility, through its privacy officer or designee, must request an accounting of disclosures of that consumer's information from that business associate. The business associate has twenty (20) calendar days to provide the accounting to DMH. That requirement is set out in the business associate agreement which will be sent to all contract mental health providers in advance of April 14, 2003. The overall requirement is set out in the HIPAA privacy rule.

(3) UNDER NUMBER 2 OF DOR 8.060, DOES THE WORDING INDIVIDUAL MEAN THE PARENT OR GUARDIAN OF A MINOR CHILD?

Yes.

(4) IF AN ACCOUNTING OF DISCLOSURES IS PROVIDED TO A CONSUMER OR THEIR LEGAL GUARDIAN ONCE WITHIN A 12 MONTH PERIOD; THEY REQUEST ANOTHER ACCOUNTING BUT INDICATE THAT THEY ARE UNWILLING TO PAY (AND ARE NOT OTHERWISE CONSIDERED INDIGENT), DO WE PROVIDE THE ACCOUNTING ANYWAY OR MERELY MAINTAIN THE "NO" FORM IN THE RECORDS?

If the client is indigent by facility standards, then an accounting can be provided at no cost. If the client or legal guardian is able to pay but elects or chooses not to, then no additional accounting will be provided. In that case, the "no" form should be maintained in the consumer's medical record.

V. VERIFICATION (DOR 8.070)

(1) WHEN DMH FACILITIES FAX TO ADMINISTRATIVE AGENTS, DO WE CONSIDER THEM A DMH LOCATION OR IS IT REQUIRED THAT WE CALL THEM TO MAKE CERTAIN THAT THEY HAVE RECEIVED OUR FAX?

Administrative agents are considered part of the Department of Mental Health's organized health care arrangement. It is not required that we call them to make certain that they have received our fax. I would also refer us to DOR 8.070. That DOR does not require that we call anyone to verify that they have received the fax. That DOR only requires that we verify whether or not we have the correct fax number before we fax to that location.

(2) WE KNOW A PARENTS VOICE, OR SOMEONE'S VOICE FROM AN AGENCY THAT WE ROUTINELY TALK WITH, DOESN'T THAT COUNT AS VERIFICATION?

No. DOR 8.070 does not allow for voice identification as an accepted method of verification. We cannot verify with 100% accuracy that anyone can identify the voice that they heard and swear that it is not someone else with a similar voice. Subsection E of DOR 8.070 indicates that telephone call verifications need to occur by using a call back phone number before releasing the information. That is the procedure to be followed.

(3) CAN WE HAVE A SCRIPT OF HOW TO RESPOND TO TELEPHONE CALLS?

Yes, such a script has been developed and is already out for privacy officers review. Once that is finalized (due date March 27th) then each facility will have a script to work off of to answer questions on the telephone.

VI. PRIVACY TRAINING (DOR 8.090)

(1) CAN WE GET CLARIFICATION ON THE LEGAL STATUS OF THE RELATIONSHIP OF THE DEPARTMENT OF MENTAL HEALTH AND THE MISSOURI PLANNING COUNCIL AND THE LOCAL REGIONAL COUNCILS? ARE THEY CONSIDERED PART OF DMH, OR PART OF THE ORGANIZED HEALTHCARE ARRANGEMENT, OR NONE OF THE ABOVE?

The Missouri Planning Council is a separate entity from the Missouri Department of Mental Health. As such, they must make their own determination about whether or not they are a covered entity and therefore have to comply with HIPAA. It is my informal understanding that their national organization has indicated that the planning council is not a covered entity, and therefore does not have to comply with HIPAA. However, DMH still must comply with HIPAA. It is further my understanding that the Planning Council believed that they never receive any consumer protected health information from the Department of Mental Health. Therefore, that should be

the position of DMH, in that we do not share protected health information with the Missouri Planning Council. If we need to share protected health information with them, then we should obtain an appropriate HIPAA compliant authorization to do so. Since the Planning Council has been determined not to be a part of DMH we are not requiring that they go through the privacy training, although we have made it available to the planning council members. In addition that means that the regional councils are not required to go through training since it is their belief that they are not part of the Department of Mental Health. However, training has been voluntarily offered for the regional advisory council staff at the local facilities, and that plan is acceptable.

(2) WILL CONSUMERS HAVE TO GO THROUGH HIPAA PRIVACY TRAINING AND WILL VOLUNTEERS HAVE TO CONTINUE TO GO THROUGH HIPAA PRIVACY TRAINING?

Yes to both. A client worker training curriculum has been completed and forwarded to the privacy officers for implementation with client workers prior to April 14, 2003. Volunteers after April 14 of 2003 will continue to have to have HIPAA training as new volunteers report to the facility. The HIPAA privacy training after April 14 of 2003 consists of the curriculum that was developed for the initial training. However, both videos will be removed from the mandatory training requirement and all interactive exercises will be removed as well. It is anticipated that the remaining training component will take approximately one hour or less for both volunteers and new employees, who must also have the HIPAA privacy training within 30 days of the date of their hire. Please note that all these requirements are set out in DOR 8.090.

(3) WILL THERE BE A CONSUMER AND FAMILY MEMBER EDUCATION PACKET DEVELOPED BY CENTRAL OFFICE?

Yes. That is currently in development and will be sent out through advocacy groups, regional advisory councils, state advisory councils, etc., as well as other identified mailing lists.

VII. DESIGNATED RECORDS SETS (DOR 8.100)

(1) ARE LOG NOTES COMPLETED BY SERVICE COORDINATORS CONSIDERED PSYCHOTHERAPY NOTES OR PART OF THE DESIGNATED RECORDS SETS?

Log notes are <u>not</u> typically considered psychotherapy notes. They are however included as part of the designated records set. Therefore they would be part of the designated records set which client's could have access to or request amendment to pursuant to the HIPAA requirement.

(2) ARE WORKING FILES AND CASE MANAGER FILES THE SAME THING?

Not necessarily. Please review the DOR on designated records sets definition. That DOR is found at 8.100. Working files are not considered part of the official medical record or designated record set and should only contain copies of documents. They should not contain originals of such documents. Originals belong in the designated records set.

(3) ARE ABUSE/NEGLECT INVESTIGATIONS CONSIDERED PART OF THE DESIGNATED RECORDS SET?

No. DOR 8.100 specifically excludes abuse/neglect investigations from the definition of designated records sets. They are never to be filed in the medical record, but instead kept separately from that record.

VIII. HUMAN RESOURCE HIPAA ISSUES (DOR 8.120 THEN TO CHAPTER 6)

(1) HAS THERE OR WILL THERE BE STANDARDIZED STATEMENTS DEVELOPED TO INCLUDE FOR ALL EMPLOYEES IN THEIR PERFORMANCE PLANS?

The following language is <u>suggested</u> to be added to each employee's performance planning and appraisal form. The language is as follows: Each employee is required to comply with the HIPAA DORs as published by the Missouri Department of Mental Health". We are purposely keeping the statement simple to make it easier to add to all the performance plans. Central Office has determined that such language will not be mandatory, as the DMH Handbook already requires compliance with all DMH policies and procedures.

(2) THE HUMAN RESOURCE DEPARTMENT AT ONE FACILITY QUESTIONED PART B (1) OF DOR 8.120, WHICH STATES THAT A RECORD OF VERBAL REFERENCES AND REFERENCE LETTERS WOULD BE PART OF THE PERSONNEL FILE. THAT PARTICULAR HR DEPARTMENT FILES THOSE ITEMS WITH THE BACKGROUND SCREENING FILE. WHERE SHOULD THESES DOCUMENTS APPROPRIATELY BE FILED?

My understanding is that the documents you reference should be filed in the personnel file. This is the practice again as I understand it in Central Office and it is the practice as put forth by DOR 8.120. As a side note, DOR 8.120 will be changed to be in Chapter 6 of the DORs which holds all of the other DORs related to human resource issues.

IX. NURSING HOME REFORM

(1) FOR THOSE INDIVIDUALS FOR WHOM DMH HAS COMPLETED NURSING HOME ADMISSION SCREENING, YET THAT IS THE ONLY SERVICE THAT DMH HAS PROVIDED FOR THEM, ARE WE REQUIRED TO GET THE NOTICE OF PRIVACY PRACTICES SIGNED BY THE RESPONSIBLE PARTY?

For any new Nursing Home Reform Act screening completed by the MR-DD Division, we should obtain the acknowledgement of the client of the notice of privacy practices. In those cases it is DMH staff who are completing the Level II evaluation forms. However, the answer appears different for the Level II evaluations completed under the auspices of CPS. In that case, CPS contracts for the Level II evaluations with an outside contractor (Bock Associates). In that case, it would be Bock's responsibility (if they have determined themselves to be a covered entity) to present and obtain acknowledgement of the Notice of Privacy Practices. We are exploring the execution of a Business Associates Agreement with Bock Associates for this program. If that is DMH's only involvement with the client, then we would not have to provide anything further. For those screenings that we have done in the past, we will not be required to go back and obtain a good faith acknowledgement of a Notice of Privacy Practices.

X. HIPAA PRIVACY AND SECURITY CONCERNS

(1) HOW SHOULD DMH HANDLE THE INTERRELATED QUESTIONS OF PRIVACY AND SECURITY WITH OUR EXISTING DATABASES UNTIL CIMOR IS EFFECTIVE?

We had anticipated that CIMOR would be available July 1, 2003, but now it has been moved back to October 2003. Since we are less than three weeks away from implementation of HIPAA, and have only recently been told that CIMOR will not be available for us for at least six months, we are currently working on how to assure that privacy and security is in place for existing data bases. More information will be forthcoming on those efforts.

(2) WHAT DO WE DO IF PROVIDER AGENCIES AND SENATE BILL 40 BOARDS REQUEST INFORMATION ON CLIENTS THAT THEY DO NOT SERVE.

Provider agencies and Senate Bill 40 groups are part of DMH's organized healthcare arrangement in cases where DMH makes the referral of service to them and they have a contract for services with DMH. It is a DMH client that they are serving through that contract process. It is then that they are treated as a member of the organized healthcare arrangement, and information can be used for treatment, payment and healthcare operations. If information is

requested on a client for whom they are not providing services, then that request would not fall under their status as an organized healthcare arrangement participant, and I do not believe that information could be released. However, DMH is exploring the option of entering into "Data Use Agreements for Limited Data Sets" with SB40 Boards who are not direct service providers to allow a limited sharing of some waiting list information.

(3) CAN DMH STAFF MEMBER RELEASES INFORMATION TO A CASE MANAGER SUPERVISOR IF THEY ASK FOR INFORMATION ON ALL CLIENTS OF THAT FACILITY, NOT JUST THEIR OWN TEAM'S INFORMATION?

We have to remember the concept of minimum necessary. What is the amount of information that that case manager's supervisor needs to know in order to do their job? If they have been given an assignment to look at tracking various services across all teams, then it would be appropriate to provide them with the information. The bottom line is to understand why they need the information and to make sure they have the authority to obtain that information. If you have questions you go to the privacy officer and have them inquire of that person's supervisor as to why there is a need to know that information in that particular circumstance.

(4) CAN WE ESTABLISH AN ELECTRONIC FORM THAT CAN BE AUTOMATICALLY ROUTED TO ACT AS A FORM OR CHECKLIST TO TRACK THE AUDIT INFORMATION WE SHOULD MAINTAIN FOR PRIVACY AND SECURITY?

I have reviewed the draft checklist on forms that were developed by one facility in order to track privacy and security information for purposes of audit function. However, that facility had generously added more things to be tracked than to what the privacy officer subcommittee agreed. The privacy officers subcommittee agreed to track two key indicators for each DOR for the first year (April 2003-April 2004). Therefore, we will attempt to establish a form that is accessible to all individuals to keep track of those two key indicators for each DOR. To track ten to fifteen indicators per DOR is not feasible at this time given the budget resources that we have. That will be forthcoming in terms of the tracking mechanism for the two key indicators per privacy DOR. We anticipate the use of either an Excel or Access form. Tracking of security key indicators will be handled and monitored by Ed Meyers, Chief Security Officer for DMH.

(5) SHOULD THE DEPARTMENT OF MENTAL HEALTH CONSIDER CONVERSION OF AUTOMOBILE LICENSE PLACES FROM OFFICIAL PLATES TO CONFIDENTIAL PLATES?

This issue has been discussed by the security coordinating team for DMH, and the decision appears to be that we will not move towards a consistent conversion to confidential plates. We simply do not have the budgetary resources to do it at this time, and it is our belief that the typical citizen cannot identify a state vehicle as belonging to DMH just by looking at the license plate without knowing that #22 is assigned to mental health. They can certainly identify that it is a state car, but not which particular agency it is assigned to simply by looking at the plate. Therefore at this time, we will not be changing our license plates.

(6) IS IT A REASONABLE PRECAUTION TO PUT PRIVACY SCREENS ON COMPUTER MONITORS SO THAT COMPUTERS IN THE NURSING STATION ARE NOT AS EASILY ACCESSIBLE BY THOSE INDIVIDUALS WALKING PAST?

Yes, privacy screens would be considered a reasonable precaution. In addition, attempting to turn the computer monitor away from a window or door would be acceptable as well. Certainly we do not expect the window or door to be covered up simply to mask the computer. Security still is a primary consideration for Biggs and Guhleman for example. As to whether or not Central Office has any funds to put privacy screens on the computer monitors, several months ago we hoped that we would. However given the drastic budget situation that is currently in place, we do not have many funds available to extend to the facilities at this time. Therefore, other reasonable alternatives need to be considered such as whether or not the physical placement of the computer can be altered or at least the monitor turned to be away from the open door. If that is not possible, whenever the person leaves the computer screen they need to minimize what is on the screen so again it is not open for contact. We would try to keep any contact at an incidental contact level. If there are any emergency physical plant or equipment changes, those should be detailed and sent to Janet Conboy, Ed Meyers and myself as soon as possible.

(7) WHAT ABOUT DEAF OR HEARING IMPAIRED CONSUMERS AND THE RIGHT TO REQUEST ALTERNATIVE MEANS OF COMMUNICATION AS REFERENCED IN THE NOTICE OF PRIVACY PRACTICES?

Sometimes deaf or hearing impaired clients may request to receive information via e-mail as an alternative means of communication. This is allowable under HIPAA, but the issue becomes one of alerting the consumer that once his or her PHI is outside of the DMH firewall or VPN, that it would not be considered secure. DMH would need the consumer to request that e-mail communication in writing, and then in that same document agree or acknowledge that they understand that e-mail may not be a secure means of

transmission outside of the DMH system. I will draft a new form which I will electronically distribute for this purpose.

(8) WHAT ABOUT PARENTS WHO ALSO REQUEST E-MAIL COMMUNICATIONS AS AN ALTERNATIVE MEANS OF COMMUNICATION? CAN WE ACCOMMODATE THAT REQUEST?

The answer is the same here as in question seven above. The issue remains one of how to make parents understand that information about their minor child could be intercepted via e-mail. While we can solve this problem with the provider community by eventually providing encryption software, it is not possible or secure to provide encryption keys to every parent who wishes to access information via e-mail. However, there are some ways to accomplish these request in a limited format. Some examples have arisen from parents who are being deployed oversees to obtain information by e-mail during the course of that deployment. In these cases, the parent should make the request if at all possible prior to the deployment and must complete a written request for that alternative means of communication. DMH can only send out that information, but cannot receive anything in from an unsecured area. Ed Meyers, Chief Security Officer, supports this interpretation. Once the parent receives the information, it is no longer DMH's responsibility to protect it.

XI. GUARDIAN AND CONSERVATOR ISSUES

(1) HOW IS IT THAT A CONSUMER CAN REQUEST TO AMEND THEIR MEDICAL RECORD WHEN IN 8.010 WHEN 8.005 SAYS THAT THE NOTICE OF PRIVACY PRACTICES IS TO BE GIVEN TO THE LEGAL GUARDIAN?

I would direct staff to read 8.010 subsection 3, subparagraph 6 which states that if a consumer with a guardian requests an amendment, a letter is to be sent to the guardian stating that the consumer is requesting an amendment and further requesting that the guardian complete the request for amendment form. Therefore any facility interpretation that a consumer can request an amendment without going through the guardian would be incorrect. The request form can be filled out by the consumer and then sent to the guardian with the letter indicating that the consumer is requesting an amendment. There is a signature line on the form attached to the DOR that is either for the consumer or the legal representative. If the guardian denies the request, then that is sent to the consumer and the process is ended at that point. As to the question of the timeframe, it seems logical that it would be sixty (60) days from the date it was received back from the guardian since only the guardian can request the amendment. The privacy officers group spent a great deal of time talking about how to use the DORs with consumers who have guardians.

Therefore every time we send something to a consumer with a guardian, just as we have always done we need to send it to the guardian as well.

(2) IF WE HAVE A SITUATION THAT WE HAVE TWO GUARDIANS OR CO-GUARDIANS, DO BOTH HAVE TO SIGN THE NOTICE OF PRIVACY PRACTICES?

Yes.

XII. FIRST STEPS

(1) This question applies to MRDD as they provide services under the program entitled "First Steps." The question pertains to what authorization the Department of Mental Health must use in order to obtain the parent's permission to disclose information again related to First Steps cases.

First Steps provides an interesting dilemma for us to implement. As you recall from the HIPAA privacy training, those records covered by FERPA or the Family Educational Rights and Privacy Act, are exempted from HIPAA protections. That exemption is what DESE is referencing when they say that FERPA trumps HIPAA and therefore they do not need to comply with HIPAA. They are correct that FERPA is an exception to HIPAA. FERPA specifically defines educational records to be part of the child's early intervention record. The term educational record includes medical, psychological, and educational records but does not include records of instructional, educational, ancillary, supervisory, and administrative issues. To the extent that our records fit the definition of educational records under FERPA, it appears that we, meaning DMH, would be able to accept the First Steps release of information form that should be filled out at intake.

I know I have previously stated that once a document hits our file, it is under HIPAA protection. While that is true for the majority of documents, I did further research into FERPA to see if that analysis held true. It appears that it does <u>not</u> with regard to the FERPA definition of educational records again which includes medical or psychological reports. Therefore, I would advise our First Step program to continue to have the First Steps release of information filled out at intake, and to honor that release of information to share information considered part of the child's early intervention record. Further, since the SPOE, system point of entry, has to do only with information released pertaining to the First Steps program, it does not appear that we need to develop a business associate agreement with those specific SPOEs, as we are sharing information with them only in relation to FERPA. And again, FERPA is an exception to HIPAA. Prior to DMH releasing any record, we would need the First Steps release, which we would accept by fax, in order to keep the process moving. Since the Individuals with Disabilities Education Act

(IDEA), section 303.321, subsection 2(ii), specifies that referrals are made no more than two working days after a child has been identified as having suspected developmental delays, we should make every effort to have a consent to referral form completed. In the event that the parent cannot physically sign that consent for referral, every effort should be made to obtain a verbal consent by telephone within the requisite two day period. I do not advise that information be released to the SPOE unless and until you have either a written consent for referral or a verbal consent for referral from the parent.

Our approach appears in line with the interpretation offered by DESE. I spoke with Georgeanne Huckfeldt of DESE who was in agreement, and who referred me to Heidi Atkins-Lieberman, who had previously outlined this same position.

XIII. MISCELLANEOUS HIPAA QUESTIONS

(1) DOR 8.100 USES THE TERMS "CENTERS FOR MEDICARE AND MEDICAID." WHAT IS THAT?

The Centers for Medicare and Medicaid is what was formerly known as HCFA or Health Care Financing Administration. HCFA has been replaced by CMS.

(2) WHAT ABOUT PROTECTED HEALTH INFORMATION THAT MAY BE RELEASED AT COURT HEARINGS WHERE OUTSIDE INDIVIDUALS MAY HEAR TESTIMONY, ETC. DO CLIENTS HAVE THE RIGHT TO REQUEST A CLOSED HEARING AND, IF SO, DO FACILITY STAFF HAVE ANY RESPONSIBILITY IN GIVING CLIENTS THIS INFORMATION, OR IS IT SOLELY THE CLIENT'S ATTORNEY RESPONSIBILITY?

It depends as to the type of court hearing as to whether or not the client can request a closed hearing. Typically that is not done in forensic conditional release hearings, for example. Therefore, information that is shared in that court hearing would not be deemed to be a HIPAA violation, because it would be shared pursuant to an appropriate judicial proceeding. There should be no liability on the part of any DMH staff who testify at such a judicial proceeding. If the hearing is a guardianship hearing, the client should discuss with his attorney whether or not they feel it would be successful to request it to be a closed matter. Most probate matters of a civil nature can be closed, but this practice varies from court to court. That would be something to indicate to the clients that they could talk about with their attorney. Any PHI shared with a court is allowed as a judiciala proceeding exception to HIPAA if the person is notified and given an opportunity to object. The person for whom a guardian/conservator has been requested is put on notice that PHI will be shared by being provided with copies of the physician interrogatories. His or her attorney will have the opportunity to object to the introduction of such

PHI, and then the court will rule. In addition, the attorney can ask for the equivalent of a protective order so that PHI then in the court file is protected. However, it does not appear that sharing information in a judicial proceeding be considered a HIPAA violation when the court has ordered us to testify. Therefore again, there should be no liability that would accrue to the DMH staff.

(3) ON ALL OUTGOING CLIENT MAIL, IT IS REQUIRED THAT THE FACILITY RETURN ADDRESS INCLUDING THE FACILITY NAME BE INCLUDED ON THE ENVELOPES. WILL WE HAVE TO START JUST USING THE FACILITY ADDRESS AND LEAVE THE FACILITY NAME OFF?

I posed this question to the HIPAA GIVES list serve. According to the responses that I received, some states decided to remove the facility name but leave on the facility address, but the other half of the states who replied were not going to remove the facility name. They considered it incidental contact, and not worthy of removal. I posed the question also to our DMH executive team, and given the financial constraints we current face, it was not deemed reasonable to do a reprint for all return envelopes at this time. Based upon the responses from the HIPAA GIVES list serve, DMH is then with the 50% of the states who are not making any changes to their return envelopes. Therefore, there will be no requirement to change return envelopes.

(4) WARD STAFF ARE VERY WORRIED ABOUT ACCUSATIONS FROM THE PATIENT POPULATION AGAINST STAFF FOR BREACH OF CONFIDENTIALITY. THEY WANT TO KNOW ABOUT RESULTING FEDERAL COURT HEARINGS FROM THESE ACCUSATIONS AND ABOUT LEGAL REPRESENTATION FOR STAFF, AS THEY FEEL THEY SHOULD NOT HAVE TO SPEND THEIR MONEY TO DEFEND THE MANY FRIVILOUS COMPLAINTS THEY BELIEVE WILL BE MADE BY OUR CLIENTS. HOW SERIOUS DOES THE COMPLAINT HAVE TO BE BEFORE THE CASE WOULD ACTUALLY GO TO COURT?

If a complaint is filed by a consumer with the Office for Civil Rights, the Department of Mental Health and the Missouri Attorney General's Office will put forth a response on behalf of the Department of Mental Health and its staff. If there is a criminal investigation, we have not yet received notification from the U.S. Attorney General's office about how that would be handled by their staff.
Typically, for civil penalties that result from a judgement arising out of the duties and responsibilities of a state employee, the legal expense fund (see Section 105.711, RSMO) is available to provide cost to cover that judgement. Legal representation in such cases is usually handled through the Missouri Attorney General's Office. The decision as to whether or not to represent a state employee is one solely made by the Attorney General's Office. We do

not foresee private causes of action under HIPAA, but may see some additional litigation resulting from our current state laws. We will have to wait and see how this plays out, but our initial attention will be drawn to the complaints filed with the Office for Civil Rights, as that is the mechanism that consumers need to use if they want to file a complaint.
There is also a HIPAA complaint DOR, that allows consumers to file a HIPAA complaint internally in addition to with the Office for Civil Rights. That complaint process is found at DOR 8.140.
Remember that one way to easily handle one possible complaint, that of copies of the medical record left in the open, is to provide the client with a copy on color paper, or with some other distinguishing mark (such as a file-stamped "client copy").

(5) SHOULD SIBLINGS NAMES, WHO ARE BOTH RECEIVING SERVICES FROM DMH, BOTH BE INCLUDED IN EACH OTHERS' PLANS?

I would not advise including the sibling names in each other's service plan. We should remember that this PHI may be required to be shared or provided to another agency, or to a court, etc. Examples would be MOJJIS (Missouri Juvenile Justice Information Services) where all agencies have agreed to share information about clients served in common through the juvenile justice system. However, if both siblings are minors, then arguably the parents could authorize the disclosing of that information.

(6) WHAT IF A CLIENT HAS A CB RADIO? DOES THIS INVOLVE ANY HIPAA VIOLATIONS?

No. The consumer may, or if there is a legal guardian who has consented to, have a CB radio unless treatment/habilitation clinically dictates otherwise. Certainly the consumer can share his or her information with anyone. The consumer should not be sharing any PHI pertaining to another consumer. While that should not place any responsibility/liability upon DMH, the consumer should be counseled that such sharing is inappropriate.

(7) UNDER DOR 8.080 (3)(E), WHY DO STAFF HAVE TO WEAR A BADGE WHEN ACCOMPANYING A CONSUMER TO A MEDICAL APPOINTMENT AND THEY DO NOT WHEN ACCOMPANYING THEM TO A LEISURE OUTING SUCH AS BOWLING?

The Privacy Subcommittee spent a great deal of time discussing this, and it was the consensus of the group that staff identification worn during a leisure activity was unnecessary and inappropriately linked the consumer to mental health services. However, the discussants agreed that it was proper and appropriate for staff to display identification when accompanying clients to clinic or other medical appointments as that other staff would have a need to

know that professional or other staff were there for security, or to provide necessary information for services. Therefore the provisions of 8.060 will remain in place.

Disclaimer:

The Missouri Department of Mental Health does not give legal advice, nor allege any legal expertise. Information and advice provided should be accepted as general in nature to guide the Missouri Department of Mental Health and its facilities' HIPAA Core Teams. Any and all other parties should consult professional counsel for specific legal advice.

The information contained herein or otherwise presented in any format is compiled from official sources within and outside the Missouri Department of Mental Health. The use of the enclosed materials is approved for compliance activities and other official business only, and is in no way intended to assert any guarantee of HIPAA Compliance.

Beyond the use as an educational resource only, any and all other use of the material is strictly prohibited. Any misappropriation or misuse of the materials should be reported immediately to the individual listed below.

Ann Dirks-Linhorst
Interim Privacy Officer
Missouri Department of Mental Health
314.877.0123
(Fax) 314.644.8911